RECORD AND BRIEF

No. 15-577

Supreme Court, U.S.
FILED
JUL - 5 2016
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARAH PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF MISSOURI, AMERICAN HUMANIST ASSOCIATION, CENTER FOR INQUIRY, FREEDOM FROM RELIGION FOUNDATION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF RESPONDENT

DANIEL MACH
HEATHER L. WEAVER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

ANTHONY E. ROTHERT
ACLU OF MISSOURI
FOUNDATION
454 Whittier Street
St. Louis, MO 63108
(314) 652-3111

JARED O. FREEDMAN
Counsel of Record
SAMUEL F. JACOBSON
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
JFreedman@jenner.com

STEVEN R. SHAPIRO
LOUISE MELLING
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

July 5, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Establishment Clause Prohibits The State From Awarding Direct Grants Of Taxpayer Funds To Houses Of Worship. 6

A. The Establishment Clause Reflects The Framers' Profound Concern Over Taxpayer Funding Of Churches. 7

1. The Framers opposed taxpayer support of houses of worship and other religious institutions, even as part of a general, nondiscriminatory program. 7

2. The Establishment Clause was intended, in part, to protect religious freedom from the specific threats associated with taxpayer funding of religious institutions. 10

B. The Establishment Clause Bars Missouri From Providing A Direct Grant Of Taxpayer Dollars To Trinity Lutheran Church..... 13

II. At A Minimum, Missouri Cannot Give Trinity Lutheran Church A Direct Cash Grant Without Including And Enforcing Appropriate Safeguards Against Religious Use Of Taxpayer Funds. 19

A. Even For Non-Church Religious Institutions, This Court Has Required Concrete Limitations On Direct Taxpayer Aid. 19

B. The Church Cannot Receive A Direct Grant Of Taxpayer Funds Without Adequate Safeguards. 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Bowen v. Kendrick, 487 U.S. 589 (1988) 22

Bradfield v. Roberts, 175 U.S. 291 (1899) 22

Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980) 23

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 20, 21

Engel v. Vitale, 370 U.S. 421 (1962) 11

Everson v. Board of Education, 330 U.S. 1 (1947) ..... *passim*

Flast v. Cohen, 392 U.S. 83 (1968) 9, 12, 14

Hunt v. McNair, 413 U.S. 734 (1973) 22

Kaplan v. Saint Peter's Healthcare System, 810 F.3d 175 (3d Cir. 2015) 16

Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America, 344 U.S. 94 (1952) 17

Lemon v. Kurtzman, 403 U.S. 602 (1971) 12, 13, 17, 24, 25

Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973) 23

Mitchell v. Helms, 530 U.S. 793 (2000) 18, 19, 25

Roemer v. Board of Public Works, 426 U.S. 736 (1976) 22

Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819 (1995) 8, 14, 20

Spiritual Outreach Society v. Commissioner, 927 F.2d 335 (8th Cir. 1991) 16

Stapleton v. Advocate Health Care Network, 817 F.3d 517 (7th Cir. 2016) 16

Tilton v. Richardson, 403 U.S. 672 (1971) .. 21, 22, 23

Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970) 14, 18

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 18

Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) 18

STATUTES

2 U.S.C. § 1602(8)(B)(xviii) 15

26 U.S.C. § 501(c)(1)(A) 15

26 U.S.C. § 501(c)(3) 15

26 U.S.C. § 6033(a)(3)(A)(i) 15

26 U.S.C. § 7611 15

Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. 15-16

Mo. Rev. Stat. § 260.335 26

Mo. Rev. Stat. § 260.273.6(2) 26

OTHER AUTHORITIES

Jesse Choper, *Securing Religious Liberty* (1995) 10

Noah Feldman, *Divided By God: America's Church–State Problem—And What We Should Do About It* (2005) 10

Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986) 8-9

Missouri Department of Natural Resources, Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143 (Dec. 2014), http://dnr.mo.gov/pubs/pub2425.htm (last visited June 30, 2016) 6

Mo. Code Regs. 10 tit. § 80-9.030 26

Trinity Lutheran Child Learning Center, Parent Handbook, https://tlclckids.com/enroll/parent-handbook/ (last visited June 30, 2016) 27

Trinity Lutheran Church, Child Ministries, http://www.trinity-lcms.org/child (last visited June 30, 2016) 27

INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. The ACLU of Missouri is a state affiliate of the national ACLU and has more than 4,500 members. As an organization that, for nearly a century, has been dedicated to preserving religious liberty, including the right to be free from compelled support for religious institutions and activities, the ACLU has a strong interest in the proper resolution of this case.

The American Humanist Association (AHA) is a national nonprofit organization that advocates progressive values and equality for humanists, atheists, freethinkers, and other nontheists, and a society guided by reason, empathy, and our growing knowledge of the world. Founded in 1941 and headquartered in Washington, DC, its work is extended through 180 local chapters and affiliates across America, including Missouri. AHA promotes Humanism, a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. AHA objects to the use of taxpayer revenue to support

---

[1] The parties have consented to the submission of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

religious activities, and joins in filing this amicus brief in order to help defend the constitutional requirement of separation of church and state.

The Center for Inquiry (CFI) is a nonprofit educational organization dedicated to promoting and defending reason, science, freedom of inquiry, and humanist values. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The Freedom From Religion Foundation (FFRF), a national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers in the United States, representing 24,000 atheists and agnostics. FFRF is a growing organization, with members in every state, including more than 300 in Missouri. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional separation between state and church. This second purpose includes ensuring that citizens, including FFRF members, are not forced to violate their conscience by financing religion, which gives FFRF a strong interest in this case.

People For the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now

has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principle that both the Free Exercise Clause and Establishment Clause of the First Amendment to the Constitution work to truly protect religious liberty for all Americans, and that the right to be free from compelled financial support for religious institutions and activities is a fundamental part of religious liberty, as our Founders recognized. PFAWF thus has a strong interest in the proper resolution of this case and accordingly joins this brief.

SUMMARY OF ARGUMENT

The question presented in this case is based on a fundamentally flawed assumption: that the government "has no valid Establishment Clause concern" respecting the direct payment of taxpayer dollars to a church. Pet. at i. The Court of Appeals, while correctly holding that Missouri was well within its constitutional authority to decline public funding of a church based on state-law protections, made the same erroneous assumption as Petitioner. In dicta, the court suggested that Missouri could have provided the funding at issue without violating the Establishment Clause.

In fact, the government's provision of direct cash aid to a house of worship raises constitutional concerns of the highest order. Missouri could not have included Trinity Lutheran Church in the grant program without violating the First Amendment because the Establishment Clause squarely prohibits the direct payment of taxpayer funds to churches and other houses

of worship. In short, Missouri's decision to exclude Trinity Lutheran Church from the program was not merely permissible; as a constitutional matter, it was required.

The use of taxpayer dollars to aid churches was one of the Framers' greatest concerns and, in large part, animated the passage of the Establishment Clause. James Madison and Thomas Jefferson recognized that compelling taxpayers to provide direct financial support to houses of worship encroaches on the right of conscience and threatens our freedom to decide for ourselves which faith to practice and support, or whether to follow any faith at all. In our increasingly pluralistic nation, where the number of nontheists and minority-faith adherents is growing rapidly, depositing taxpayer dollars into churches' coffers also advances religion in a way that is likely to engender the very sort of religious divisiveness and church-state interdependence the Framers sought to avoid.

Speaking to the Framers' fears, in case after case this Court has affirmed that providing direct government aid to religious institutions, even as part of a general program, raises grave Establishment Clause concerns. To be sure, the Court has, in some cases, upheld government aid to certain non-church religiously affiliated institutions, such as elementary and secondary schools, colleges, and universities. Those circumstances, though, have been limited, and the Court was always assured that the aid would not be used for religious activities or later diverted to religious purposes. *But never for a church.*

Churches and houses of worship are the quintessential religious institutions. By tradition and design, they play a unique and central role in many faiths. As a practical, spiritual, and symbolic matter, they are often the lifeblood and focal point of the religious community. The many Establishment Clause concerns that this Court has identified with respect to the direct funding of non-church religiously affiliated institutions, such as schools, apply with even greater force when it comes to houses of worship. These concerns cannot be surmounted, even with extensive monitoring and other safeguards that the Court has authorized for direct government aid provided to other types of religious institutions.

This Court's Establishment Clause jurisprudence has few bright-line rules, but in this instance, the Court should reiterate that our historical aversion to direct taxpayer funding of houses of worship is one line that may not be crossed, no matter how well-meaning the government program may be. Strict enforcement of this constitutional boundary is essential to maintaining the delicate balance that the Framers sought to create in singling out religion for special protection.

Even should the Court decline, however, to conclude that direct taxpayer funding of a house of worship is always prohibited, at a minimum, *amici* urge the Court to clarify that the proposed funding in this case would nevertheless violate the Establishment Clause. This Court has never authorized direct taxpayer funding of a religious institution without adequate safeguards to prevent its misuse for sectarian ends. Trinity Lutheran Church refused to certify that it would not use the

playground supported by taxpayer dollars for religious purposes, such as a gathering space in which the church directs children in prayer or other religious instruction. And the state program includes no monitoring requirements or other precautions to protect against such impermissible religious uses of the playground. This is more than sufficient to render the grant unconstitutional.

ARGUMENT

I. The Establishment Clause Prohibits The State From Awarding Direct Grants Of Taxpayer Funds To Houses Of Worship.

Petitioner asks this Court to issue an unprecedented ruling that would *require* the government to provide direct cash subsidies to a church. The Court should decline to adopt this proposed constitutional rule. The State is correct in arguing that it violated none of Trinity Lutheran Church's rights in declining to include the Church in its Playground Scrap Tire Surface Material Grant Program ("Scrap Tire Program"),[2] and this Court can affirm on that basis alone. But as the history of the First Amendment and this Court's precedents

---

[2] Under the Scrap Tire Program, which is administered by the Missouri Department of Natural Resources, "public school districts, private schools (depending on status), park districts, nonprofit day care centers, other nonprofit entities and governmental organizations other than state agencies" are eligible to apply for grants to resurface their playgrounds using scrap tires. Missouri Department of Natural Resources, Playground Scrap Tire Surface Material Grant Application Instructions for Form 780-2143 (Dec. 2014), http://dnr.mo.gov/pubs/pub2425.htm (last visited June 30, 2016).

demonstrate, Missouri's funding decision was not only permissible, but constitutionally commanded. Requiring Missouri to dispense taxpayer dollars to a church would contravene the fundamental principles underlying the First Amendment and gut one of its core religious-liberty protections.

A. The Establishment Clause Reflects The Framers' Profound Concern Over Taxpayer Funding Of Churches.

1. *The Framers opposed taxpayer support of houses of worship and other religious institutions, even as part of a general, nondiscriminatory program.*

In drafting and adopting the Establishment Clause, the Framers, including Madison (the principal architect of the First Amendment) and Jefferson, were reacting to what they viewed as the unconscionable treatment of religious dissenters and minorities throughout the colonies. Religious minorities and nontheists were imprisoned and persecuted for their purported heresy, and they were "compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters." *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947) (footnote omitted). In fact, at the time, "[a]lmost every colony exacted some kind of tax for church support." *Id.* at 10 n.8.

It was against this historical backdrop that Madison drafted his famous "Memorial and Remonstrance

Against Religious Assessments," opposing Virginia's "Bill establishing a provision for Teachers of the Christian Religion." Under the original text of the bill, each taxpayer could direct his taxes to support religious education carried out by the particular sect he favored; it was later amended so that taxpayers could also refuse to designate a religious society as the recipient of the tax, and the funds would default to the Legislature to be appropriated to both religious and non-religious education. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 869 n.1 (1995) (Souter, J., dissenting) ("The assessment had been carefully drafted to permit those who preferred to support education rather than religion to do so." (quoting T. Buckley, *Church and State in Revolutionary Virginia*, 1776–1787, p. 133 (1977))); *see also Everson*, 330 U.S. at 36-37 (Rutledge, J., dissenting). However, "[t]he fact that the bill, if passed, would have funded secular as well as religious instruction did nothing to soften Madison's opposition to it." *Rosenberger*, 515 U.S. at 869 n.1 (Souter, J., dissenting). *Accord Everson*, 330 U.S. at 37 (Rutledge, J., dissenting) ("Madison was unyielding at all times, opposing with all his vigor the general and nondiscriminatory as he had the earlier particular and discriminatory assessments proposed.").

Whether government assistance to religion occurred in connection with a preferential scheme, or a general, nondiscriminatory program, Madison was adamant that even "three pence" in aid was too much of a threat to religious liberty. *Id.* at 40 (citing Memorial and Remonstrance ¶ 3); *see also, e.g.*, Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim*

About Original Intent, 27 Wm. & Mary L. Rev. 875, 921, 923 (1986) (The Framers "did not substitute nonpreferential taxes for preferential taxes; they rejected all taxes. . . . The principle was what mattered. With respect to money, religion was to be wholly voluntary. Churches either would support themselves or they would not, but the government would neither help nor interfere."); *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) ("The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general.").

While the Virginia bill promoting taxpayer support for religious education languished in the wake of Madison's famous protest, another bill—rooted in the same religious freedom ideals espoused by Madison—flourished. Drafted by Thomas Jefferson and passed in 1786, the "Virginia Bill for Religious Liberty" declared that "compel[ling] a man to furnish contributions of money for the propagation of opinions[,] which he disbelieves[,] is sinful and tyrannical," and provided, as a remedy to this evil, "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." *Everson*, 330 U.S. at 12-13 (internal quotation marks omitted).

Through the Memorial and Remonstrance and the Virginia Bill for Religious Freedom, Madison and Jefferson gave voice to many who objected to the abusive treatment of religious minorities and dissenters.

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling

> of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment.

Id. at 11 (footnotes omitted).

2. The Establishment Clause was intended, in part, to protect religious freedom from the specific threats associated with taxpayer funding of religious institutions.

The non-establishment principle embraced by the Framers was not incorporated into the First Amendment out of hostility toward religion. Rather, it reflected the Framers' understanding that religious freedom, and religion in general, would be endangered in demonstrable ways if the government's influence over, and involvement in, matters of faith were not severely restricted.

When the government's support for religion takes the form of direct taxpayer aid, the threat to religious liberty is especially high. As the Framers recognized, the historical practice of compelling individuals to financially support religion was a direct assault on the fundamental human right of freedom of conscience. *See supra* Part I(A)(1); *see also* Noah Feldman, *Divided By God: America's Church–State Problem—And What We Should Do About It* 48 (2005) ("The advocates of a constitutional ban on establishment were concerned about paying taxes to support religious purposes that their consciences told them not to support."); Jesse Choper, *Securing Religious Liberty* 16 (1995) ("There is

broad consensus that a central threat to the religious freedom of individuals and groups—indeed, in the judgment of many, the most serious infringement upon religious liberty—is posed by forcing them to pay taxes in support of a religious establishment or religious activities." (internal quotation marks omitted)).

In the Framers' view, the decision whether to adhere to or support a particular faith, or none at all, is one that every person has a right to make without the slightest coercion, and taxpayer funding of religious institutions violates that ideal. *See, e.g.*, *Everson*, 330 U.S. at 65-66 (Memorial and Remonstrance ¶ 3: "Who does not see that . . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"). Not surprisingly, then, "[i]n no phase was [Madison] more unrelentingly absolute than in opposing state support or aid by taxation." *Id.* at 40 (Rutledge, J., dissenting). And, while the Framers' concerns for freedom of conscience are applicable to all religiously affiliated institutions, they are substantially heightened and pronounced when the aid is given to houses of worship, as argued below. *See infra* Part I(B).

The Framers also worried that "a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Madison lamented that the government's financial support for religion weakens support for religion and undermines its "purity and efficacy." *Everson*, 330 U.S. at 67 (Memorial and Remonstrance ¶ 7).

Tying houses of worship financially to the State also undermines religious freedom by inviting the government to scrutinize and oversee their operations. *See Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) ("The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."). Despite any short-term gain for the government-funded religious institution, in the long run, religious liberty is eroded, and, in the case of direct aid to a church, church autonomy is impeded. *See Flast*, 392 U.S. at 103-04; *Everson*, 330 U.S. at 27-28 (Jackson, J., dissenting) ("Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that 'It is hardly lack of due process for the Government to regulate that which it subsidizes.'" (quoting *Wickard v. Filburn*, 317 U.S. 111, 131 (1942))); *cf. infra* Part I(B) (noting First Amendment problems when government interferes with church autonomy).

Finally, taxpayer support for religious institutions gives rise to divisiveness along religious lines—"one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622; *see also, e.g., Everson*, 330 U.S. at 69 (Memorial and Remonstrance ¶ 11: "[I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects."). It provokes religious strife by branding, as second-class citizens, those who object, for reasons of conscience, to aiding a particular sect or religion generally. *See, e.g., Everson*, 330 U.S. at 69 (Memorial

and Remonstrance ¶ 9: "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority.").

Further, it pits faith against faith, sect against sect, by creating competition and conflict among denominations and religions as they fight for an ever-larger share of the government's largesse. *See id.* at 53-54 (Rutledge, J., dissenting). This type of religiously based discord threatens the political process and, ultimately, our democracy. *See Lemon*, 403 U.S. at 622-23; *Everson*, 330 U.S. at 54 (Rutledge, J., dissenting) ("The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.").

B. The Establishment Clause Bars Missouri From Providing A Direct Grant Of Taxpayer Dollars To Trinity Lutheran Church.

This Court, under very limited circumstances, has authorized direct cash aid for some religiously affiliated institutions, as discussed below. *See infra* Part II(A). *But it has never authorized direct cash aid for a church or house of worship.* In light of our constitutional history, this type of aid strikes at the core of the Establishment Clause. Although the Court need not reach this issue to determine that Missouri's denial of aid was proper, *amici* urge the Court to reaffirm that, under the First Amendment, the government may not provide taxpayer dollars directly to churches and other houses of worship.

In *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970), the Court upheld tax exemptions for churches in the face of an Establishment Clause challenge. The Court's ruling hinged on the "unbroken practice of according the exemption to churches" that spanned "our entire national existence and indeed predates it," as well as the fact that "the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675, 678. But the Court warned of the dangers of direct taxpayer grants for churches:

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and separation.

Id. at 675 (footnote omitted).

Twenty-five years later in *Rosenberger*, the Court again acknowledged that the government's award of cash aid for churches would violate the Establishment Clause: "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." 515 U.S. at 844. *Cf. Flast*, 392 U.S. at 98 n.17 (characterizing Congress's hypothetical provision of funds for "the construction of churches for particular sects" as "palpably unconstitutional").

The Court's wariness is well founded. Houses of worship are uniquely situated religious institutions. While faith-based nonprofits and religiously affiliated schools may play some role in the religious community, houses of worship are the lifeblood of many faith systems; they stand at the heart of organized religion. Churches occupy vital and central roles in Christianity, as do mosques in Islam, temples in Hinduism, synagogues in Judaism, gurdwaras in Sikhism, and so on. Symbolically, these houses of worship are inextricably intertwined with the faiths they represent in a manner that is just not true of other religious institutions.

For these reasons, our laws frequently distinguish between houses of worship and other religiously affiliated institutions and organizations in different contexts. For example, Section 501(c)(3) of the Internal Revenue Code differentiates between houses of worship and other nonprofits, religiously affiliated or otherwise. Relying on this distinction, many provisions of the tax code provide exemptions to houses of worship that are not afforded to other religiously affiliated entities. Although tax-exempt organizations are generally required to file a Form 990 (Return of Organization Exempt From Income Tax), for instance, churches are not. 26 U.S.C. § 6033(a)(3)(A)(i). Churches also are exempt from registering with the IRS as nonprofit organizations. 26 U.S.C. §§ 501(c)(1)(A), 501(c)(3). The Lobbying Disclosure Act does not apply to churches. 2 U.S.C. § 1602(8)(B)(xviii). And churches enjoy enhanced protection against audits. 26 U.S.C. § 7611. Similarly, "in order to prevent excessive government entanglement with religion," the Employee Retirement

Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., exempts from its requirements employee benefit plans offered by houses of worship but not identical plans offered by church-related or religiously affiliated institutions or organizations. *See, e.g., Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 519 (7th Cir. 2016).

The lower courts have enforced these distinctions, which provide houses of worship—in light of their special stature in faith systems—with breathing room to carry out their unique religious functions. *See, e.g., id.* (holding that church-affiliated health-care system did not qualify for ERISA church plan exemption); *see also Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175, 186 (3d Cir. 2015) (applying same reasoning to religiously affiliated hospital); *Spiritual Outreach Soc'y v. Commissioner*, 927 F.2d 335, 339 (8th Cir. 1991) (upholding IRS determination that a gospel-music organization was not a church and did not qualify for church exemptions).

The Establishment Clause's prohibition of direct government aid to churches is, necessarily, part and parcel of the special status we afford to houses of worship. *See Everson*, 330 U.S. at 40 (Rutledge, J., dissenting) ("'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."). As a result of the unique and pivotal place that houses of worship hold across different faith systems, the government's delivery of direct cash aid to them implicates Establishment Clause concerns of the highest order—even more directly and powerfully than

the concerns associated with providing such aid to non-church religiously affiliated institutions. These concerns cannot be overcome by any measure of safeguards. On the contrary, such government intrusion into the operation of a church would, with great likelihood, itself violate the First Amendment. *See Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952) (noting that the Constitution guarantees churches "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"); *see also Lemon*, 403 U.S. at 620-22.

Accordingly, Missouri was not only permitted to deny funding to Trinity Lutheran Church; it was constitutionally mandated to do so. In contrast to non-church religiously affiliated institutions that have sought aid in previous cases before this Court, Trinity Lutheran is a house of worship.

Although the Church purports to lay claim to this subsidy for the preschool and day care center it operates on church premises, they are one and the same: The preschool and day care merged into the church in 1985. Pet. App. 2a. And, ultimately, it is the church that seeks taxpayer dollars to improve church facilities (in this case a playground), which will benefit not only the preschool and day care center but the church as a whole.

The aid sought by Petitioner is thus of an entirely different character than generally available services provided to houses of worship by police and fire departments. *See Everson*, 330 U.S. at 60-61 & n.56 (Rutledge, J., dissenting). And it goes far beyond the

indirect, tax-exempt aid that this Court upheld for churches in *Walz*: Here, the State would be "transfer[ring] part of its revenue" into the coffers of a house of worship. *Cf. Walz*, 397 U.S. at 675; *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) ("[O]ur decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." (internal citations omitted)); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10, 12–13 (1993) (upholding provision of government-paid sign-language interpreter for deaf student at religious school because "no funds traceable to the government ever find their way into sectarian schools' coffers" and the interpreter would "be present in a sectarian school only as a result of the private decision of individual parents"); *Everson*, 330 U.S. at 18 ("The State contributes no money to the schools. It does not support them.").[3] In short, no matter how well-meaning the grant program may be, the funding proposed by Petitioner cannot be reconciled with our constitutional

---

[3] That the grants are distributed as part of a general program does not render them constitutional when directed to a church or house of worship. The Framers resisted such funding, *see supra* Part I(A)(1), and the Court has "never held that a government-aid program passes constitutional muster solely because of the neutral criteria it employs as a basis for distributing aid." *Mitchell v. Helms*, 530 U.S. 793, 839 (2000) (O'Connor, J., controlling concurrence). Moreover, the discretionary nature of the Scrap Tire Program, *see* Resp. Br. at 22-23 (citing Pet. App. 120a-154a), compounds the Establishment Clause dangers here.

history or this Court's precedents. It must be prohibited under the Establishment Clause.

II. At A Minimum, Missouri Cannot Give Trinity Lutheran Church A Direct Cash Grant Without Including And Enforcing Appropriate Safeguards Against Religious Use Of Taxpayer Funds.

Even if churches could receive public aid in some circumstances, the Court should affirm that the direct grant of taxpayer dollars at issue here is not permissible. The Establishment Clause prohibits the government from paying for religious facilities if they will be used for religious purposes. Here, Trinity Lutheran Church insists that the State abandon its obligation to enforce this constitutional rule. It claims a right to taxpayer funds, but will not—and indeed cannot—agree to follow any restrictions ensuring it will not use its playground, once improved at taxpayer expense, to advance the Church's religious mission. In fact, the limited record before the Court indicates that the Church will do just that.

A. Even For Non-Church Religious Institutions, This Court Has Required Concrete Limitations On Direct Taxpayer Aid.

This Court has never allowed direct cash aid, even for non-church religious institutions, without adequate safeguards against misuse for religious purposes and activities. And for good reason: This form of state aid for religious institutions "falls precariously close to the original object of the Establishment Clause's prohibition." *Mitchell v. Helms*, 530 U.S. 793, 856 (2000)

(O'Connor, J., controlling concurrence). Thus, in its rulings severely limiting such aid, the Court has continually highlighted the "special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 515 U.S. at 842.

In *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 763-64 (1973), for example, the Court struck down a law that would have provided direct cash aid to private elementary and secondary schools, including religious schools, serving large numbers of low-income students. The aid was to be used for a worthy cause—the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." *Id.* at 762 (internal quotation marks omitted); *see also id.* at 763 (noting the legislature's findings that a "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children in low income urban areas" (internal quotation marks omitted)). The Court did not "question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren," *id.* at 773, but the grant program still could not pass muster under the Establishment Clause because it failed to protect against the use of the aid for religious purposes:

> No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these

> religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

Id. at 774.

Nyquist followed the precedent set in *Tilton v. Richardson*, 403 U.S. 672, 689 (1971), in which the Court upheld a direct grant program for colleges and universities, including religiously affiliated ones, to assist in the construction of academic facilities. There, unlike in *Nyquist*, the law was "carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions." *Id.* at 679. First, the statute expressly limited the use of the program's grants and loans for the construction of academic facilities that would "be used for defined secular purposes and expressly prohibit[ed] their use for religious instruction, training, or worship." *Id.* at 679-80. Second, the government retained a twenty-year interest in the buildings constructed with grant funds and was authorized to monitor compliance with the religious-use rule through on-site inspections. *Id.* at 675. Third,

colleges and universities that violated this restriction were required to pay back funds. *Id.* at 680.

These safeguards, the Court ruled, were generally adequate to obviate any Establishment Clause concerns, especially given the Court's understanding that "religious indoctrination [was] not a substantial purpose or activity of the [participating] church-related colleges and universities." *See id* at 687.[4]

However, in *Tilton* the Court did take issue with one important aspect of the direct-grant program: the

---

[4] The other instances in which the Court has upheld direct taxpayer funding for religiously affiliated organizations all included similar safeguards. *See, e.g.*, *Bowen v. Kendrick*, 487 U.S. 589, 614–15 (1988) (upholding direct aid provided to faith-based organizations as part of a general grant program for teen counseling on sexuality where statute set forth a detailed "mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes," and remanding to district court for determination as to whether any religious organizations had improperly used aid to further their religious beliefs); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 741-42 (1976) (affirming constitutionality of direct, noncategorical grants for colleges and universities, including religiously affiliated schools, where law excluded institutions awarding primarily theological degrees, expressly prohibited any sectarian use of aid, and set forth numerous administrative requirements and documentation to ensure compliance with sectarian-use prohibition); *Bradfield v. Roberts*, 175 U.S. 291, 298-300 (1899) (allowing direct government aid to a religiously affiliated hospital where the hospital's corporate charter limited its purpose and services to the secular realm); *cf. Hunt v. McNair*, 413 U.S. 734, 739-40, 744 (1973) (upholding bond-financing program for colleges because statute forbade facilities constructed with bond-related funds from being "used for religious purposes," and authorized inspections to enforce prohibition).

expiration of the prohibition on religious use after twenty years, which would have "open[ed] the facility to use for any purpose at the end of that period." *Tilton*, 403 U.S. at 683. In that regard, the Court held that the program failed to satisfy the Establishment Clause because "the unrestricted use of a valuable property is in effect a contribution of some value to a religious body." *Id.* (explaining that if the building were converted to a chapel or "otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion").

Similarly, in *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479-80 (1973), the Court affirmed a permanent injunction barring direct money grants for religious schools to provide, among other services, the administration, grading, and reporting of certain examination results. Noting that "no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction," the Court held that the grants ran afoul of the Establishment Clause because "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities." *Id.* at 480. The Court reaffirmed that "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." *Id. But see Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 659 (1980) (upholding subsequent version of the *Levitt* program after statute was amended to provide "effective means for insuring that the cash reimbursements would cover only secular services" and

"ample safeguards against excessive or misdirected reimbursement").

On at least one occasion, this Court has held that, despite numerous safeguards to protect against religious uses, a direct cash aid program was nevertheless unconstitutional. In *Lemon*, the Court invalidated a Pennsylvania law that directly reimbursed private elementary and secondary schools, including religious schools, for expenses relating to teachers' salaries, textbooks, and instructional materials. 403 U.S. at 609, 620-25. The measure was passed after the Legislature determined that rising costs in the State's private schools had caused a "crisis." *Id.* at 609. Under the statute, the reimbursement aid was restricted to "courses presented in the curricula of the public schools"—specifically, "solely" secular subjects such as mathematics, foreign languages, physical science, and physical education. *Id.* at 610 (internal quotation marks omitted). Moreover, the use of the aid in connection with "any subject matter expressing religious teaching, or the morals or forms of worship of any sect" was explicitly prohibited, and the State Superintendent of Public Instruction was required to approve all textbook and instructional materials financed by the program. *Id.* (internal quotation marks omitted). In addition, participating schools were required to adopt "prescribed accounting procedures that identify the separate cost of the secular educational service," and those accounts were open to audit by the state. *Id.* (internal quotation marks omitted).

These extensive safeguards, however, were not a panacea. Quite the opposite—the "very restrictions and

surveillance necessary to ensure that teachers play[ed] a strictly non-ideological role" engendered their own troubling result: unconstitutional entanglement between religion and government. *Id.* at 620-21.[5]

B. The Church Cannot Receive A Direct Grant Of Taxpayer Funds Without Adequate Safeguards.

Trinity Lutheran has made it clear that it will not (and cannot) provide the certifications that Missouri requires for participation in the Scrap Tire Program: that it is "not owned or controlled by a church," that its "mission and activities are secular," and that the grant will be used for non-religious purposes. Pet. App. 128a-129a (ECF No. 36-3). Absent those certifications, there is simply no way to ensure that any grant that Trinity Lutheran receives will not be used to promote religion in violation of the Establishment Clause. That alone is sufficient to uphold the decision below.

But, even if the Church could and did provide the certifications that Missouri requires, it would be insufficient to protect the constitutional interests at stake because there is no way for the State to enforce these restrictions. Unlike the funding programs upheld in *Tilton* and *Roemer*, for example, the State is not

---

[5] The Court's long-standing commitment to ensuring that direct aid to religious institutions is not used for religious purposes extends as well to in-kind—as opposed to direct cash—aid. *See, e.g.*, *Mitchell*, 530 U.S. at 840-41, 848-49 (O' Connor, J., controlling concurrence) (detailing numerous safeguards put in place to ensure that government's direct, in-kind loans of materials and equipment to public schools were not diverted to religious uses).

authorized under the Scrap Tire Program to conduct inspections, or otherwise monitor the playground facilities to ensure that they are restricted to non-religious uses. *See generally* Mo. Rev. Stat. §§260.335, 260.273.6(2); Mo. Code Regs. tit. 10 § 80-9.030. Likewise, there appears to be no mechanism for the State to recover all or part of a grant should a recipient use the playground for impermissible sectarian activities.

Trinity Lutheran argues that, if awarded to the Church, the grant at issue here would be "wholly secular." Pet. Br. at 39. Not so. The limited record before the Court shows a significant risk that the Church will use its taxpayer-improved playground for religious activities. Trinity Lutheran Church integrates religious teaching into all aspects of the preschool and is, therefore, likely to use its taxpayer-financed playground for religiously oriented activities. As the Church readily acknowledges in its Complaint, "[t]he Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program. Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County and the surrounding area." The Learning Center's educational program is structured to allow a child to grow spiritually, physically, socially, and cognitively and the Church uses the Learning Center "to teach the Gospel to children of its members, as well to bring the Gospel message to non-members." Pet. App. 101a ¶¶ 14-18.

The preschool's parent handbook, moreover, explains that its "daily morning schedule consists of Jesus Time/chapel, music, small group time, learning centers, gym and playground time." It further describes its curriculum as being "Christ-centered in its approach to teaching developmental and academic readiness skills, concepts, and values. Prayer is an integral part of each day, as are daily 'Jesus Time' classes and weekly chapel times with the pastors. The members of the staff are committed to providing an atmosphere of personal warmth and support which stems from a love of our Lord and a love for the children." Trinity Lutheran Child Learning Center, Parent Handbook, https://tlclckids.com/enroll/parent-handbook/ (last visited June 30, 2016).

In addition, without an enforcement mechanism, the Church could use its playground, improved at taxpayer expense, for similar religious purposes in connection with the church's Vacation Bible School, Sunday School, or any other youth-oriented church event that involves religious instruction or indoctrination. *See* Trinity Lutheran Church, Child Ministries, http://www.trinity-lcms.org/child (last visited June 30, 2016).

Because the record shows that Trinity Lutheran Church would likely engage in religious instruction, prayer, or other forms of religious activity on its taxpayer-improved playground, and because the Missouri Scrap Tire Program lacks adequate safeguards against this misuse of government aid, Petitioner's proposed grant would run afoul of the Establishment Clause.

CONCLUSION

The suggestion by Petitioner and the Court of Appeals that providing direct cash aid to a church raises no valid Establishment Clause concerns is belied by our constitutional history and this Court's precedents. The judgment of the Eighth Circuit should be affirmed for the reasons presented herein.

Respectfully submitted,

DANIEL MACH
HEATHER L. WEAVER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

JARED O. FREEDMAN
Counsel of Record
SAMUEL F. JACOBSON
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
JFreedman@jenner.com

ANTHONY E. ROTHERT
ACLU OF MISSOURI FOUNDATION
454 Whittier Street
St. Louis, MO 63108
(314) 652-3111

STEVEN R. SHAPIRO
LOUISE MELLING
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

July 5, 2016